The Free Exercise Clause: Are Exemptions to Neutral Laws Required? A Historical and Political Inquiry

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"If anything, moving in the direction of more regulations isn't consonant with the Framers' intent."[i]

– Justice Antonin Scalia

"[R]eligious freedom is one of the most cherished parts of our constitutional tradition…the Free Exercise Clause and the Establishment Clause [stand for] our first freedoms."[ii]

– Michael McConnell

[i] Scalia Question and Answer Session
[ii] McConnell (B), p. 1243

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Introduction

The First Amendment to the United States Constitution constitutes a strong bulwark against potential tyranny.[1] Under its terms, the government cannot abrogate the rights to free expression, to assemble, and to petition. However, freedom of religion – the "crux of the struggle for freedom in general" – enjoys pride of place over even these critical rights.[2] Thus, religious liberty is the "first freedom" that Americans enjoy.[3] In particular, Congress (and the states) are forbidden from "prohibiting the free exercise" of religion – Christians and Jews, Muslims and Wiccans, practitioners of indigenous religions and of newly-formed faiths alike enjoy the right to worship in the manner in which they see fit.[4]

As is the case with many constitutional provisions, successive generations of scholars have arrived at divergent conclusions as to the meaning of the Free Exercise Clause. One faction of scholars believes that the Free Exercise Clause provides affirmative protection to religious groups – that even when a generally applicable, facially neutral law incidentally burdens a person or group's religious exercise, the law is unconstitutional as applied to that person or group. An opposing strain of scholarship holds that the Clause provides somewhat less protection, merely restricting the government from directly targeting religious exercise for special burdens. In this view, incidental burdens caused by generally applicable laws are constitutionally permissible.

At varying points in judicial history, the Supreme Court's free exercise doctrine has been consonant with each side's interpretation. With minor exceptions, the Court historically balanced

[1] See, e.g., Hobson, p. 268
[2] *Everson v. Board of Education*, 330 U.S. 1 (1947) (Rutledge, J., dissenting)
[3] McConnell (B), p. 1243
[4] Free Exercise Clause, Amendment I, United States Constitution. Note also that the courts have adopted an expansive definition of "religion" that extends as far as secular humanism (and other traditions that lack belief in the existence of a higher power). See, e.g., *Torcaso v. Watkins*, 367 U.S. 488 (1961) ("Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others…").

state interests against the interests of religious individuals, subjecting laws to strict scrutiny once a party had shown that a statute caused a substantial burden on his or her religious exercise. However, in an abrupt turn in 1990, the Supreme Court repudiated that standard, holding that facially neutral, generally applicable laws did not violate the Free Exercise Clause simply because they incidentally burdened religious exercise.

In this paper, I approach the Free Exercise Clause from an interpretivist perspective, as I believe that the context in which the Clause was developed, as well as the intentions of those who drafted and ratified the Clause, are critical to understanding what the Clause should legally require. I begin by providing a summary of the relevant jurisprudence, and I explain the current and historical standards used to adjudicate free exercise claims, highlighting the Supreme Court's abrupt doctrinal change. I then speak about Congress' legislative response to the Court's decision, the Religious Freedom Restoration Act, whose legislative history examines events in revolutionary-era Virginia the circumstances surrounding the development and ratification of the Bill of Rights, and free exercise jurisprudence generally.

At that point, I provide a justification for using an interpretivist methodology, following which I examine events in the history of religious liberty in Virginia. I begin by exploring the Virginia Declaration of Rights, which guaranteed religious liberty to that state's inhabitants. I then use two case studies of events in Virginia to demonstrate that the popular conception of religious liberty and free exercise was robust. Following that, I move to the views of James Madison, who was deeply involved in the events in Virginia. Finally, I provide an account of the circumstances surrounding the adoption of the Bill of Rights, which Madison was principally responsible for writing.

Virginia is particularly informative, for as Justice Rutledge wrote, the "great instruments of the Virginia struggle for religious liberty … became warp and woof of our constitutional tradition."[5] During the Revolutionary era, the rest of the nation looked to Virginia to inform their conceptions of religious freedom for various reasons.[6] An outsize percentage of the nation's political elites – Washington, Jefferson, Madison – hailed from Virginia, and their experience informed the nation. Moreover, Virginia's battle for religious liberty was the most prominent of the era.[7] If the context in which the amendments were developed is important, the Virginia experience – on which the "chief interest in all the union" was centered – provides the basis for understanding what that context was.[8]

Ultimately, I conclude that the first faction of scholars provides a more satisfying answer – more likely than not, the Framers intended the Free Exercise Clause to be robust. As Congress and the President found in 1993, "[L]aws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise."[9] It is not just the latter from which the Free Exercise Clause protects religious believers. It is the former as well.

The *Sherbert* Test and *Smith*

Because I extensively consider the Supreme Court's interpretation of the Free Exercise Clause, I begin this paper by explicating the two standards on which the Court has historically relied to decide free exercise claims (currently, the *Smith* standard, and prior to that, the *Sherbert* test).

[5] *Everson* (Rutledge, J., dissenting)
[6] Cobb, p. 484
[7] Id., p. 484
[8] Id., p. 484; Buckley, p. ix
[9] 42 U.S.C. §2000bb(a)(2)

Historically, the Free Exercise Clause has not been among the most frequently litigated constitutional provisions. Modern free exercise jurisprudence began in 1961 with two cases.[10] The first was *Torcaso v. Watkins*, in which the Supreme Court, relying on both the First and Fourteenth Amendments, held that states could not require a religious test as a prerequisite for holding public office.[11] The second was *Braunfeld v. Brown*, in which the Court held that a statute requiring businesses to close on Sunday did not violate the free exercise rights of Orthodox Jews.[12] It is, however, the third case – *Sherbert v. Verner* (1963) – that is best remembered as the source of the eponymous test used (until 1990) to determine whether an individual's free exercise rights had been violated.[13]

The *Sherbert* Test, a species of strict scrutiny, consists of four prongs. The test begins by requiring the individual to prove two things. First, he must prove that he has a sincerely held religious belief, and second, he must demonstrate that some governmental law or action constitutes a substantial burden on his ability to act on those beliefs. If the individual successfully demonstrates those two things to the court, the law or action is subjected to strict scrutiny. In order for the government to prevail, it must prove that it is acting to accomplish a compelling state interest, and that it is doing so in the most narrowly-tailored way possible. Thus, the state of South Carolina was not permitted to deny Sherbert welfare benefits for refusing to work on her Sabbath, as the availability of the welfare benefit could not be contingent on a requirement to violate one's religious beliefs.

[10] *Cantwell v. Connecticut*, 310 U.S. 296 (1940) is also important, as it is the case in which the Court held that the Free Exercise Clause applied to the states under the Fourteenth Amendment's incorporation doctrine.
[11] *Torcaso v. Watkins*, 367 U.S. 488 (1961)
[12] *Braunfeld v. Brown*, 366 U.S. 599 (1961)
[13] *Sherbert v. Verner*, 374 U.S. 398 (1963)

Until the Court's holding in *Employment Division v. Smith* (1990), the *Sherbert* Test was used to determine whether the Free Exercise Clause had been violated.[14] In *Smith*, the Court adopted a far more permissive standard. If a law were facially neutral and generally applicable, it would no longer be held to violate free exercise rights. Thus, the state of Oregon was permitted to deny unemployment benefits to various Native Americans because they had ingested peyote (a controlled substance) during a religious ceremony – a practice that predates the arrival of Europeans in the New World.[15]

Smith's doctrinal change came as a complete surprise to the legal community.[16] Indeed, counsel for both parties assumed that the Court would use the *Sherbert* test to decide the case, and neither side argued otherwise in either written or oral arguments.[17] Justice Scalia, writing for the majority, asserted that the Free Exercise Clause was never intended to exempt religious believers from generally applicable laws.[18] The majority held that the strict scrutiny mandated by the *Sherbert* test was only applicable in two types of cases: those involving claims for unemployment benefits (as *Sherbert* itself was), and those implicating both free exercise rights and another constitutional claim.[19] Notably, the majority failed to provide an underlying rationale that would justify the limitation of the *Sherbert* test to so-called "hybrid cases."[20]

Although she concurred in the Court's judgment, Justice O'Connor criticized the majority for abandoning the *Sherbert* test without any "convincing reason."[21] In her view, *Smith* eviscerated the Free Exercise Clause – she thought it clear that the Constitution sets religious conduct apart as a "preferred…activity," and argued that the Court's new standard subverted that

[14] *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990)
[15] Laycock (B), p. 7
[16] Id., p. 2
[17] Id., p. 1
[18] Marin, p. 1456
[19] Id., pp. 1457-8
[20] Id., p. 1458
[21] *Smith*, p. 901 (O'Connor, J., concurring)

goal.[22] Moreover, she expressed concern that the *Smith* standard would permit majoritarian institutions to trample on the rights of minority religious groups, contrary to the purpose of the Bill of Rights.[23] The dissenting justices largely agreed with O'Connor as to the shortcomings of the majority's new standard, but concluded that the state's interest was not sufficiently compelling to justify applying Oregon's controlled substance statutes to the respondents.[24]

The holding in *Smith* comprises the jurisprudential status quo. The Free Exercise Clause has been construed to provide no defense against the application of otherwise neutral laws, and therefore the state must no longer prove that its laws are able to withstand strict scrutiny. Thus, religious believers are far less protected under *Smith* than they were under *Sherbert*. They no longer have a constitutional basis to claim exemptions from burdensome laws, except in a very limited set of circumstances.

Consider the following hypothetical statute: a city decides to ban the possession and consumption of alcohol within its borders.[25] Such a law would present severe problems for Catholics, as the Eucharist cannot be celebrated without alcoholic wine made from grapes.[26] The Eucharist – in which bread and wine are transubstantiated into the literal body and blood of Christ – is the *sine qua non* of the Latin Rite Mass, and Catholics are fundamentally unable to practice their religion without celebrating the Eucharist.

Under the *Smith* rule, such a neutral and generally applicable statute would be permissible, barring evidence that the statute was enacted for the purpose of targeting Catholic

[22] Id., pp. 901-2 (O'Connor, J., concurring)
[23] Id., p. 903 (O'Connor, J., concurring)
[24] Marin, pp. 1463-5
[25] Note that the Twenty-first Amendment to the Constitution permits states to regulate alcohol as they see fit, and that in many states, such authority is delegated to the county and/or local level.
[26] See the *Catholic Encyclopedia*'s entry for "Altar Wine" for more information as to the exact requirements that a wine must meet in order to be used as part of Mass.

religious exercise.[27] By contrast, under the *Sherbert* test, the city would have to prove that applying the statute to Catholics celebrating Mass would further a compelling state interest that justified the effective suppression of the Catholic religion – in my opinion, an impossible burden to meet.

This example, of course, is not completely far-fetched, as a similar statutory regime was in effect during Prohibition. Catholics, however, were unaffected, as the legislation that regulated alcohol during prohibition contained a particularized exemption for sacramental wine.[28] This exemption was likely granted because Catholics form a significant percentage of the American population, and therefore enjoy considerable political clout. By contrast, a smaller religious group would likely find itself unable to obtain an analogous exemption – hence Justice O'Connor's warning of the reduced protection provided by the *Smith* standard. This is why the stakes are so high for religious believers: unless one belongs to a religious with sufficient political power to substantively affect legislative decisions, one is essentially powerless against the tyranny of the majority.[29] The Free Exercise Clause, understood robustly, provides the only constitutional guarantee of accommodation for minority religions – a guarantee that only the *Sherbert* standard preserves.

The Religious Freedom Restoration Act (RFRA)[30]

The Court's abrupt change in doctrine did not go unnoticed, as the holding in *Smith* created widespread controversy and outraged members of the legal community, religious groups,

[27] See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993)
[28] National Prohibition Act, Title II, § 3 (note that this law is commonly known as the "Volstead Act")
[29] This is true even if such tyranny is unwitting: under *Smith*'s rule, exemptions must be explicitly written into statute. It is thus easy for legislators to unintentionally abrogate the rights of members of lesser-known religions.
[30] 42 U.S. Code, Chapter 21B (42 U.S.C. §2000bb)

and civil liberties advocacy organizations.[31] Ultimately, Congress would take action, passing the Religious Freedom Restoration Act, which required the judiciary to discard the *Smith* standard and restore the *Sherbert* test. Though the Supreme Court would eventually rule RFRA unconstitutional as applied to the states, it still provides a strong statutory basis for free exercise claims against the federal government. Most importantly, RFRA provides Congress' perspective on the history of free exercise in the United States, including Congress' conclusion that the Free Exercise Clause was intended to provide religious believers with a means to gain exemptions from facially neutral, generally applicable laws.

In the immediate wake of *Smith*, legal scholars took O'Connor's dissent to heart, predicting that members of minority religions would be particularly fearful, as they indeed lacked sufficient political clout to demand particularized legislative exemptions to statutes burdening their religious exercise.[32] Those predictions, however, understated the scope of the overwhelmingly negative public reaction. Members of mainstream religions – including the United States Conference of Catholic Bishops, the episcopal conference representing the clergy of the single largest denomination in the United States – were extremely concerned about *Smith*.[33] Moreover, a diverse cadre of nonreligious groups, such as the Home School Legal Defense Association, Concerned Women for America, and the American Civil Liberties Union, joined religious groups to oppose what they saw as an attack on civil liberties.[34]

Galvanized by this political support, Congress began to craft a legislative response. In 1990, Rep. Stephen Solarz introduced the Religious Freedom Restoration Act. The bill specifically repudiated the Supreme Court's holding in *Smith* and required the judiciary to

[31] Laycock (B), p. 1
[32] Mykkeltvedt, p. 630
[33] Senate Hearing, p. III
[34] Id., p. III; Drinan, p. 533

employ the *Sherbert* test, which it had used prior to that decision.[35] Although it initially appeared that the bill would easily pass – its sponsor noted that support for the bill was similar to that for "motherhood and apple pie"[36] – it languished in committee for several years, as various constituents worried that the bill, as written, would provide an opportunity for pro-choice advocates to successfully challenge restrictions on abortion.[37]

In March of 1993, then-Representative Charles Schumer introduced a revised version of the Religious Freedom Restoration Act. Substantially similar to the earlier proposed legislation, the proposed text clarified various minor points. In order to obviate the abortion-related concerns, Congress agreed to create legislative reports reflecting that the bill would not affect the issue. Rather, like every other issue, abortion-related claims would be evaluated under the pre-*Smith* framework.[38] Thus, although the 1993 bill differs from the original proposal, much of the testimony offered to Congress regarding the 1990 bill is nevertheless applicable to the later version.

The religious stakeholders having been appeased, this iteration of RFRA was well-received by Congress, as a bipartisan coalition of sixty Senators and one hundred seventy Representatives co-sponsored the bill.[39] Congressional voting mirrored that high level of support – the bill was passed with only three dissenting votes in the Senate, and by a unanimous voice vote in the House. President Clinton was an enthusiastic supporter and quickly signed the bill, noting that it would protect "fundamental" civil liberties.[40]

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[35] Drinan, p. 533
[36] House Hearing I, p. 13 (statement of Rep. Stephen J. Solarz)
[37] Drinan, p. 534
[38] Id., p. 538
[39] See entries in THOMAS for H.R.1308 and S.578 for the 103rd Congress.
[40] Clinton, p. 2377

Although there had been debate as to the constitutionality of RFRA, Congress, guided by testimony from acknowledged legal experts,[41] believed that RFRA was a constitutionally permissible exercise of its power under the enforcement clause of the Fourteenth Amendment.[42] In relevant part, the Amendment provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[43] Additionally, the Amendment affirmatively grants Congress the power to enforce its provisions.[44] Thus, Congress interpreted RFRA as a mechanism that secured the right to free exercise – a liberty guaranteed to citizens by the Fourteenth Amendment's Due Process Clause – against the states.[45]

In 1997, however, the Supreme Court overturned RFRA as applied to the states, reasoning that Congress had exceeded its constitutional authority.[46] Although the Court conceded that the Fourteenth Amendment grants Congress the power to promulgate legislation enforcing the right to free exercise, it held that RFRA was not an example of such legislation.[47] The Court believed that RFRA, rather than enforcing the constitutional right to free exercise, attempted to alter the meaning of the Free Exercise Clause.[48]

Justice Kennedy, writing for the Court, ruled that RFRA effectively substituted Congress' interpretation of the Constitution for the judiciary's, an impermissible violation of separation of powers.[49] RFRA, the Court held, was a Congressional attempt to "decree the substance of

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[41] E.g. House Hearing II, p. 66 (summary of statement of Douglas Laycock)
[42] House Report, p. 9
[43] Amendment XIV, United States Constitution (§ 1)
[44] Id. (§ 5) (see also *Katzenbach v. Morgan*, 384 U.S. 631 [1966])
[45] *City of Boerne v. Flores*, 521 U.S. 507 (1997)
[46] Id.
[47] Id.
[48] Id.
[49] Id.

[constitutional] restrictions on the States."[50] In the Court's eyes, RFRA was not only unconstitutional, but dangerous – if Congress were permitted to decide the meaning of the Fourteenth Amendment (and thus the meaning of the rights-granting constitutional provisions thereby incorporated against the states), it would be able to subvert the Constitution, justifying any law as permissible by virtue of the Amendment's grant of enforcement powers.[51]

Despite the Court's holding, the substantive portions of RFRA are still binding on the federal government, as Congress is broadly empowered to limit its own activities.[52] Thus, although RFRA creates a federal statutory right, *Smith* is still the authoritative constitutional standard for interpretation of the Free Exercise Clause.

RFRA is particularly relevant because its legislative history reflects Congress' explicit belief that the Free Exercise Clause was intended to provide exemptions from generally applicable laws. In its report on RFRA, the House Committee on the Judiciary spoke of generally applicable laws as "nefariously burden[ing]" free exercise.[53] Similarly, the Senate Committee on the Judiciary characterized such laws as "abuses" that serve to "severely undermine[] religious observance."[54] Concomitant with this belief, text of RFRA notes that laws that incidentally burden religious exercise are as repugnant to the guarantees of the Clause as laws that intentionally interfere with religious exercise.[55]

Additionally, the Senate committee explicitly addressed the Framers, expressing its belief that one of the United States' founding principles was "the right to observe one's faith, free from Government interference."[56] Moreover, President Clinton concurred with Congress, stating,

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[50] Id. (at p. 9 [slip op.])
[51] Id. (at p. 19 [slip op.])
[52] E.g. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006)
[53] House Report, p. 2
[54] Senate Report, p. 5
[55] 42 U.S.C. §2000bb(a)(2)
[56] Id., p. 4

"[RFRA] reestablishes a standard that better protects all Americans of all faiths in the exercise of their religion in a way that I am convinced is far more consistent with the intent of the Founders of this Nation than the Supreme Court decision [*Smith*]."[57]

Viewed in the light of RFRA's legislative history, the bill's pronouncement that "the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment" is no mere platitude.[58] Rather, it represents the clear Congressional belief that facially neutral, generally applicable laws may substantially burden religious exercise, and are not constitutionally tolerable. This finding is consonant with the robust understanding of free exercise that I believe relevant events in Revolutionary-era Virginia demonstrate – the subject to which I will now turn.

Why Original Intent and Meaning are Important

At this point, I will discuss originalism in some depth, as I will spend the rest of this paper discussing 18th century events. As the divergent standards that the Supreme Court has used to evaluate free exercise claims demonstrate, making sense of the Constitution (or of statutes generally) can be a difficult task. In the vast majority of cases, statutory language is ambiguous, at least to some degree. Thus, courts (or legislatures) must look to many factors when deciding what a statute requires – and two of the most important elements that contribute to understanding statutes are the original meaning of the text and the intent of the original authors (and, when appropriate, ratifiers) of the statute.[59]

As statutory interpretation can be a difficult task, the judiciary has adopted "canons of construction," which provide a consistent framework – a common set of tools – that judges can

[57] Clinton, p. 2377
[58] 42 U.S.C. §2000bb(a)(1)
[59] To clarify, I intend the term "statute" to encompass both ordinary laws and the Constitution.

use to make sense of laws.[60] Even when the text of the statute is unambiguously clear, judges will not necessarily enforce the meaning of that text if it would produce an absurd result.[61] For example, although the text of the Eleventh Amendment does not forbid citizens of a state from suing that state in federal court, the Supreme Court held that the purpose of the amendment reflected a broad conception of state sovereign immunity, and therefore that the amendment precluded such suits.[62]

One of the situations in which the judiciary will apply a different meaning than the plain language indicates is when it would "frustrate Congress's clear intention."[63] Legislative intent is a valuable tool in the judiciary's arsenal, as it allows judges to determine what those who passed the law thought the law would accomplish.[64] Ascertaining legislative intent has been a core part of common law to such an extent that the validity of the technique enjoys wide consensus in the legal community.[65]

The Constitution, as the fundamental law of the United States, is superior to all other statutes. Thus, when evaluating whether a law conflicts with the Constitution, judges must interpret the Constitution itself.[66] Therefore, the text of the Constitution (including amendments), the intention of the members of the Constitutional Convention (or of the drafters of an amendment), and the understanding of the ratifying states are important factors in determining the meaning of any Constitutional clause.

Moreover, the Framers themselves believed that original intent and meaning were critically important. James Madison wrote that "the sense in which the Constitution was accepted

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[60] For an (incomplete) list of canons, see Llewellyn, pp. 401 ff.
[61] Id., p. 403 (canon/counterargument 12)
[62] *Hans v. Louisiana*, 134 U.S. 1 (1890)
[63] *Dunn v. Commodity Futures Trading Commission*, 117 S. Ct. 913 (1997)
[64] CRS Report, pp. 41 ff.
[65] Rotunda, p. 507; also, Smith, p. 570
[66] Scalia, p. 854 (see also *Marbury v. Madison*, 5 U.S. 137 [1803])

and ratified" is the exclusive sense in which "it is the legitimate Constitution."[67] The constancy of original intent and meaning provides legal stability,[68] without which the Constitution would be a mere "thing of wax" to be arbitrarily shaped by future interpreters; Jefferson was particularly worried about the unelected, unaccountable judiciary doing so.[69] Indeed, Madison saw adherence to original intent and meaning as a key safeguard ensuring that the government would operate in accordance with the Constitution.[70]

The Framers' views on the importance of original intent and meaning are consonant with those of contemporaneous political and judicial elites. Indeed, the concept of originalism was so ubiquitous that it was unnecessary to give it a name.[71] From centuries before the Revolutionary War, English courts had given great importance to both considerations, and American courts continued to do so post-Revolution.[72] Indeed, theories that ignore or marginalize original intent and meaning began to gain credence only in the late twentieth century.[73] Perhaps the best reason to care about original intent and meaning is that the courts have done so for centuries – and it is on precedent that the entire system of common law rests.[74]

Thus, although the original intent of the Framers and of the ratifying states, as well as the meaning of the text as originally understood, are not dispositive to the exclusion of all other considerations, they should be given great weight when interpreting the Constitution.

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[67] Madison to Henry Lee, June 25, 1824 (in Papers of Madison)
[68] Id.
[69] Jefferson to Spencer Roane, September 6, 1819 (in Papers of Jefferson). There is some debate as to Jefferson's stance on original intent and meaning, due to the fact that he famously advocated for a new constitutional convention every twenty-five years. However, I do not think that such a belief is necessarily incompatible with adherence to original intent and meaning: after all, as long as a constitution exists, there must be some standard by which we can judge it. Once a new constitution is adopted, the guiding standard will presumably be the original intent of the new authors, as well as the original understanding of the new text.
[70] Madison to Lee.
[71] Kay, p. 704
[72] Id., pp. 704-5
[73] Id., p. 705
[74] See, e.g., Stone, p. 6

Virginia's Declaration of Rights

Several months before the Continental Congress adopted the Declaration of Independence, the Fifth Virginia Convention adopted the Virginia Declaration of Rights.[75] The Declaration of Rights secured the right to freedom of religion – as well as the explicit right to free exercise – for Virginia's residents. The debate surrounding the adoption of the Declaration of Rights highlights the tension between Madison's expansive conception of religious liberty, and the narrower conception, limited to mere tolerance, held by an opposing faction. Ultimately, Madison's understanding prevailed, demonstrating that Virginians tended to believe that religious liberty was a critical right requiring robust protection.

The Declaration of Rights, principally drafted by George Mason, was intended to complement the forthcoming constitution that would be adopted by a newly independent Virginia.[76] A precursor to the federal Bill of Rights, the Declaration of Rights enumerated various now-familiar rights appertaining to the inhabitants of Virginia, such as freedom from cruel and unusual punishment, freedom of the press, and the right to a speedy trial conducted with an impartial jury.[77]

Freedom of religion was among these rights, and was addressed by the last section of the Declaration of Rights. However, a significant number of delegates to the Virginia Convention, led by James Madison, believed that the proposed language insufficiently protected religious rights.[78] Thus, Madison submitted a counterproposal that included several substantial changes intended to secure a greater degree of religious freedom.[79]

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[75] Reinstein, p. 370
[76] Smith, p. 579; Buckley, p. 17
[77] Virginia Declaration of Rights (1776).
[78] Buckley, pp. 17-18
[79] Smith, pp. 580 ff.

Madison and his allies believed two portions of Mason's language to be especially problematic. First, Mason's draft stated that "all men should enjoy the fullest toleration in the exercise of religion"; second, the state could abrogate religious exercise if adherents were to "disturb the peace, the happiness, or safety of society."[80]

In Madison's eyes, Mason's formulation placed religious believers at the mercy of the state. The use of the word "toleration" implied that freedom of religion was a construct of legislative grace, to be granted and retracted according to the whims of the majority.[81] As he saw it, freedom of religion was an inalienable, natural right.[82] Thus, Madison's counterproposal substituted the phrase "all men are entitled to the full and free exercise" of religion.[83]

As to the second concern, Madison believed that Mason's formulation allowed the state to unjustly intrude upon religious exercise.[84] Thus, in his counterproposal, the only situations in which the state might restrict religious exercise were when one religious group sought to deny "equal liberty" to another, or when "the existence of the State [was] manifestly endangered."[85] These extremely limited circumstances represented the most stringent limits on state interference with religious matters up to that point in time.[86]

After several weeks of debate, the Virginia Convention adopted the Declaration of Rights in its entirety; as for the religious clause, it adopted a combination of Madison and Mason's proposed language.[87] On both important points, however, Madison's views prevailed. The

[80] Id., p. 579 (quoting Mason's original draft)
[81] Id., p. 581
[82] Id., p. 581
[83] Id., p. 580 (quoting Madison's counterproposal)
[84] Id., pp. 580-1
[85] Id., p. 580 (quoting Madison's counterproposal)
[86] Id., pp. 582-3
[87] Id., pp. 583-4

Convention rejected Mason's "tolerance" formulation, adopting the position that "all men are equally entitled to the free exercise of religion."[88]

Moreover, the Declaration of Rights, as promulgated, specified no circumstances under which religious exercise might be abrogated, likely because the Convention wished to avoid the issue.[89] However, in rejecting Mason's language, the Convention at least indicated its belief that such a low bar for state interference was impermissible. At any rate, the Convention's decision represented movement towards Madison's expansive definition of religious liberty, and recognition that religious liberty was a right rather than a privilege.[90]

The Declaration's adoption demonstrates that the Madisonian conception of religious liberty was gaining traction among the people of Virginia (or at least among the state's political elites). Mere tolerance was no longer sufficient: the state was required to recognize that free exercise was a right belonging to each individual, not to be trifled with lightly.

Religious Liberty in Virginia (Introduction)

In the decade following the Revolution, the Virginia Legislature, no longer bound by the British Parliament, enacted many new laws and changed many existing ones. Laws pertinent to the relationship between civil society and religious believers were no exception. Indeed, the House of Burgesses addressed the issue often enough that it had a standing Committee for Religion.[91] The Committee had jurisdiction over a wide range of matters – the financial affairs, properties, and lands of the established church; all proposed laws affecting religion generally; and "all matters and things relating to…morality" – and had the power to receive and consider

[88] Id., p. 583 (quoting the Virginia Declaration of Rights, as adopted)
[89] Id., p. 584
[90] Id., p. 584
[91] See, e.g., *Journal of the House of Virginia, 1781-1786*, p. 43 (digitized edition)

petitions from concerned citizens, as well as to request information and evidence to inform their deliberations.[92]

Two episodes are particularly informative of the contemporary attitude towards religious liberty in the state. First, immediately after the beginning of the Revolution, the Legislature passed an act requiring that all citizens swear a loyalty oath and serve in the militia. This was problematic for members of two minority religions, who petitioned the legislature for an exemption from the law. Second, almost a decade later, the Legislature considered authorizing a general assessment to support Christianity within the state, which triggered a year-long, statewide debate about the proposed law. In both cases, the party that desired a stronger conception of religious liberty prevailed.

I: Quakers and Menonists: Exemptions from Laws

As with the rest of the states, Revolutionary-era Virginia was largely inhabited by Christians. However, there were at least two significant religious minorities, Quakers and Menonists (commonly known today as Mennonites). Although these groups were generally able to practice their religion according to the dictates of their consciences, there were two notable areas in which their beliefs caused them legal disabilities: loyalty oaths (also referred to as "juring") and military service.

By an act of the General Assembly in force in 1777, the state of Virginia required all free males sixteen years of age (or older) residing within the state to swear or affirm a loyalty oath to the state; the substance of the oath is that the oath-taker confirmed the renunciation of all allegiance to the British Crown, while confirming his allegiance to the "free and independent

[92] Id., p. 43

state" of Virginia.[93] Although such a requirement would seem bizarre today, the General Assembly's justification for mandating the oath is easy to understand, particularly given that the statute was enacted in the midst of the Revolutionary War. Protection was contingent on allegiance.[94]

The penalties for failing to swear the oath were severe. The state stripped those who refused to comply of several of their civil rights and liberties. Non-swearers were stripped of arms and ammunition – a precarious situation in which to be during the 18th century (and during the ongoing war in particular) – forbidden to hold public office, disqualified from voting, and banned from serving on juries.[95] Moreover, they were forbidden from purchasing or inheriting real property, including any attendant improvements.[96]

This presented severe problems for the Quakers, as their religious beliefs forbid adherents from swearing oaths.[97] Their belief rests on one of Jesus' commands, delivered during the Sermon on the Mount: "But let your communication be, Yea, yea; Nay, nay: for whatsoever is more than these cometh of evil."[98] Thus, Quakers believe that when one says something, one should do it (and vice-versa). Adding an oath "cometh of evil" (that is, of the Devil) and is therefore proscribed.[99] Menonists share this belief with Quakers, and were therefore analogously affected.[100]

By 1783, however, the legislature had recognized that the requirement was unjust as applied to the Quakers and Menonists, and it therefore promulgated a statute exempting both

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[93] Hening, p. 282 ("*An act to oblige the free male inhabitants of this state above a certain age to give assurance of Allegiance to the same, and for other purposes.*")
[94] Id. ("[P]rotection and allegiance are reciprocal…")
[95] Id.
[96] Id.
[97] Aldridge, p. 49
[98] Matthew 5:37 (Authorized King James Version)
[99] To illuminate this, note that the New International Version translates "cometh of evil" as "comes from the evil one").
[100] *Confession of Faith in a Mennonite Perspective*, Article 20 (pp. 75-76)

groups from having to swear the oath.[101] Notably, the legislature explicitly recognized that the groups' objections were a direct result of sincerely held religious beliefs, and characterized the penalties that the groups were forced to suffer as "oppressive."[102] Moreover, the legislature retroactively sanctioned the groups' noncompliance by explicitly deeming valid any purchases of real property by Quakers or Menonists between the enactment and repeal of the oath requirement.[103]

Non-juring was not the only area in which the Quakers received a particularized exemption from otherwise generally applicable laws. As their beliefs precluded them from bearing arms, they also received an exemption from participating in the monthly musters held by the militia, at which attendance was mandated by law.

The Quakers first requested the exemption in June of 1784, when the House of Delegates received a petition from Quakers living in Frederick County stating that refusing to bear arms was a "fundamental principle[] of their religion" and requesting to be exempted from the monthly muster, their compelled attendance at which they characterized as a "very great grievance."[104] The House referred the petition to the Committee on Propositions and Grievances, which deemed it reasonable after only four days of consideration.[105]

Less than one week later, a bill aptly titled "*An act to exempt Quakers from attending musters*" passed the House, already having been read three times. Two days after it passed the House, the Virginia Senate agreed to the bill. Thus, in less than a month after submitting a

[101] Hening, pp. 252-3 ("*An act to repeal so much of any act or acts of assembly as subject the people called quakers or menonists to penalties or disabilities for non-juring*")
[102] Id.
[103] Id. (Section II)
[104] *Journal*, pp. 438-9
[105] Id., p. 445

petition – and with apparently no immediate opposition – the Quakers received their requested exemption.

Although the petition exclusively came from the Quakers, and the bill referred to Quakers alone, there is reason to believe that the bill also applied to Menonists, whose religious dictates also forbade them from bearing arms.[106] Secondary literature from the late 19th century indicates that a 1785 petition submitted by the Baptists complaining of the exemptions granted to the Quakers and Menonists – the only petition during that timeframe opposing the exemptions – referred directly to the exemption from participation at musters.[107] Thus, it appears that although the law did not explicitly mention Menonists, the group nevertheless received the same exemption granted to the Quakers.

This case study demonstrates the willingness of the Virginia Legislature, having enacted a facially neutral, generally applicable bill, to readily provide exemptions to such statutes when appropriate.[108] Each of these requirements was significant, as both loyalty oaths and the mustering requirement were thought necessary for wartime readiness and success.[109] Two specific items are particularly worthy of note: the lack of anything more than token, belated opposition to either request, and the legislature's willingness to recognize the degree to which the requirements inconvenienced religious minorities.

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[106] Like the Quakers, they also submitted petitions to the legislature requesting various exemptions; see, for example, Id., p. 530

[107] Grigsby, Volume II, p. 123; for the original petition, see *Journal*, p. 628

[108] Note that judicial review did not yet exist, which is why legislatures, rather than courts, provided exemptions from generally applicable statutes (see, e.g., *Boerne* [O'Connor, J., dissenting]).

[109] For loyalty oaths, see Hening, p. 282; for an example of the purpose of the militia, see Hening, pp. 9 ff. ("*An ordinance for raising and embodying a sufficient force, for the defense and protection of this colony*")

II: The "Christian Teachers Bill"

Like many states in the Revolutionary era, Virginia had an established church, choosing to designate the Episcopal Church as such. The Episcopal Church, like its counterparts in other states, had received financial support throughout the colonial era by means of legally mandated tithing. However, in 1776, after Virginia adopted its state Bill of Rights, it abolished the practice.[110]

Predictably, the (established) Episcopal Church was displeased. In a 1784 appeal to the legislature, the church noted its desire that the government generally "aid and patronize" the Christian religion, a desire that some others shared.[111] For example, earlier in the same year, the citizens of the county of Warwick, concerned about what they characterized as a contemporary dearth of morality, petitioned the legislature to enact a general tax on the citizenry to support Christianity.[112] The House's Committee on Religion, which had jurisdiction over the petition, thought the petition reasonable.[113]

Later that year, the legislature received another petition on the same subject, this time from various residents of the county of the Isle of Wight. The petitioners were upset that civil government had withdrawn itself from affairs of religion, and that people were "left without the smallest coercion to contribute to its support."[114] Because they believed that the very "prosperity and happiness" of the state depended on religion, they also argued for a general assessment to support it.[115]

[110] McConnell (A), p. 1436
[111] *Journal*, p. 422
[112] Id., p. 394
[113] Id., p. 409
[114] Id., p. 487
[115] Id., p. 487

In November, the House of Delegates, meeting as the Committee of the Whole, resolved by a vote of 47-32 that it was their opinion that the people of Virginia ought to pay a tax for the support of the Christian religion.[116] The community was swift to react, as only one week later, the legislature received its first petition disapproving of the idea.[117] A second petition, received shortly afterwards, decried the idea; both petitions were referred to the Committee of the Whole.[118] Despite their earlier victory in the Committee of the Whole, the supporters of the general assessment were never able to secure its passage.[119]

By December, references to the general assessment *per se* disappeared. Hoping to encourage wider support by framing the issue as one of education rather than of worship, the drafting committee revised the bill's title.[120] Staunchly supported by Patrick Henry, the revised bill would levy a general assessment not for the support of the Christian religion generally, but for "teachers of the Christian religion."[121] The House spent several days debating the bill, and its first two readings were successful. However, before the third reading could take place, the House resolved – on Christmas Eve, no less – by a vote of 45-38 to table the bill until the fourth Thursday of November 1785.[122]

In the interim, delegates (and state senators) were to return to their home districts, each with twelve printed copies of the bill, to include the names of those legislators who voted in the affirmative and the negative.[123] During 1785, each side campaigned fiercely in favor of its position. Notably, James Madison's *Memorial and Remonstrance against Religious Assessments*,

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[116] Id., p. 495
[117] Id., p. 505
[118] Id., p. 525, 537
[119] McConnell (A), p. 1436
[120] Buckley, p. 105
[121] Id. (Also, note that "teachers" refers to clergy.)
[122] *Journal*, p. 558
[123] Id.

which castigated the bill both as poor public policy and as contrary to the interests of religion, was written and delivered during that time.

The response to the bill, delivered through petitions, was overwhelming both in its size and in its relative agreement.[124] During 1785, at least sixty-nine petitions were presented to the House, sixty of which were against the bill and nine of which supported it.[125] In percentage terms, eighty-seven percent of petitions opposed the bill, compared to a mere thirteen percent in favor. Further, a large portion of the reasons that petitioners gave for opposing Henry's bill reflected broad community ideas of religious freedom. Included among these reasons was that the bill was repugnant to the Virginia Bill of Rights (which guaranteed free exercise at the state level),[126] that it was inconsistent with an established community understanding of religious freedom,[127] and that it violated the principle of equal religious liberty.[128] Other petitions simply characterized the proposed law as an example of oppression and injustice[129] or incompatible with community interests,[130] while some opposed the law because they believed that it would harm, rather than help, religion.[131] Those supporting the bill generally believed that it was the state's

[124] As to why the bill's proposers miscalculated the level of public support that the bill enjoyed, it appears that they underestimated how dedicated Madison (et al.) was to the cause of religious liberty (to the extent that they spent the summer campaigning against it). It also appears that Patrick Henry was extremely powerful in the House of Burgesses (particularly at whipping votes with oratory), and thus that the bill initially had more support than popular opinion would necessarily suggest.
[125] Numbers from analysis of the *Journal*. I say at least sixty-nine rather than precisely sixty-nine because on two occasions, the records note that "several" petitions were received from members of the same group (e.g. Quakers). Based on context, I counted these as three petitions; it seems as if there were more than two, but I chose a conservative estimate in order to avoid potentially overstating my claim.
[126] Id., p. 604
[127] Id., p. 612, 654
[128] Id., p. 622
[129] Id., p. 624
[130] Id., p. 649
[131] Id., p. 671

role to promote religion,[132] as a successful republic required morality, which only religion could provide.[133]

In keeping with the public opinion expressed in the petitions, the House never chose to take the bill off the table, resulting in its defeat. However, this was not the end of the battle. Madison, not content with merely defeating the general assessment, turned his energies towards the proposed Virginia Act for Establishing Religious Freedom, written by Thomas Jefferson.[134] This bill accomplished precisely the opposite of Henry's, ensuring that no one could be compelled to attend or support any religious activities.[135] Moreover, the bill reinforced the Virginia Bill of Rights' free exercise provision, clarifying that it was impermissible to deprive anyone of civil rights due to their religious convictions.[136]

In late 1785, the opponents of Jefferson's bill attempted to employ the same parliamentary tactic that prevented Henry's bill from achieving passage in 1784: tabling the third reading until late the next year. However, they were soundly defeated, as the House of Delegates passed the bill on a lopsided vote of 74-20.[137] In early January of 1786, the Senate and the House concurred on a jointly-amended version, and the bill was then promulgated.[138]

This case study serves as a further demonstration of the contemporary attitude towards religious liberties in Virginia. Having begun with an original proposal to tax each inhabitant for the support of Christianity, the idea's proponents scaled down their bill such that a tax would support the ministers of various denominations. However, after a yearlong campaign, public opinion established itself as decisively against the proposal.

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[132] Id., p. 622
[133] Buckley, p. 175
[134] Kurland, p. 854
[135] Jefferson, "The Virginia Act for Establishing Religious Freedom"
[136] Id.
[137] *Journal*, p. 682
[138] Id., p. 729, 734

Critically, public opinion was not merely based on a lack of desire to be taxed, as the petitions submitted against the proposal tend to cite qualms based on religious and libertarian concerns. Indeed, the proposed assessment triggered widespread dismay, galvanizing the pro-religious liberty movement. Thus, the legislature did not merely reject the proposed tax. Rather, it enacted a bill that explicitly disavowed the idea, as well as provided comprehensive protections to all religious groups. The Christian Teachers' bill was a massive loss for proponents of a narrow conception of religious liberty, as it stands for a statewide embrace of Madison's robust vision of religious freedom.

Religious Liberty in Virginia (Conclusion)

The previous two case studies illuminate the Revolutionary-era attitudes towards religious liberty in Virginia. While the first explicitly demonstrates the state's willingness to grant exemptions to neutral laws to burdened religious believers, the second is indicative of the general attitude towards religious liberty in the state. Facing the specter of a potential tax for the support of Christianity, the citizenry registered their disapproval – not of the tax *per se*, but of the principles supported by the tax's proponents. Thus, the legislature responded by not only killing the tax, but also passing an expansive guarantee of religious liberties, in line with what public opinion demanded.

Madison's Personal Beliefs

James Madison provides the vital link between the fight for religious freedom in Virginia and the Free Exercise Clause, as he was a leader of the former and the principal author of the

latter. [139] As the father of religious liberty in Virginia and the "Father of the Constitution," Madison provides perhaps the most revealing account of the Framers' interpretation of the First Amendment.[140] His views are critically important to understanding the meaning of the Clause – and his views are unambiguous. Madison was a consistent advocate for civil liberties generally, as well as an outspoken advocate of a robust conception of religious freedom.[141]

Cited as the document with the greatest explanatory power with respect to the Founding Fathers' views on religious liberty, Madison's *Memorial and Remonstrance Against Religious Assessments* discusses the relationship between civil government and religious exercise at length.[142] Written as part of the campaign against the proposed Virginia general assessment, the *Remonstrance* denounces the bill as an "experiment on our liberties" and a violation of the free exercise rights protected by the Virginia Bill of Rights.[143]

The heart of Madison's opposition was rooted in the idea that government has no power to interfere in religious matters:

> The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right…because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society…[and] Religion is wholly exempt from its cognizance.[144]

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[139] Finkelman, p. 302
[140] Hobson, p. 215
[141] Madison likely came to these views early in life, as the influence of a tutor led him to eschew an education at the Anglican College of William and Mary, a bastion of the Virginia elite, in favor of study at the College of New Jersey (known today as Princeton University), known for being a hotbed of politically active Protestant dissenters. There, his academic mentor was John Witherspoon, the president of the college and a leading member of the Presbyterian clergy, who was well-known for his support of extensive religious liberty. Well before Madison came under his tutelage, Witherspoon gave a sermon on the Acts of the Apostles, in which he argued that good men – "servants of God" – would often be persecuted by civil authorities for failing to comply with commands that conflicted with their religious beliefs. Given Witherspoon's influence on Madison, it is not unexpected that the latter's views were consonant with the former. See Pepper, pp. 302 ff., as well as McConnell (A), pp. 1446 ff.
[142] McConnell (B), p. 1246
[143] *Remonstrance*, §§4-5
[144] Id., §1

Madison's statement leaves absolutely no room for ambiguity – civil society is completely forbidden from interfering with religious exercise. Because men's (and women's) obligations to God take precedence over their obligations towards society, it would be impermissible for society to restrict the ability of its members to worship in the manner that they believe is divinely ordained. Still less can the legislature – a derivative of society – restrict religious exercise, as any legislature that would attempt to do so would be guilty of tyranny and thus illegitimate.[145]

Ambiguity in the First Congress

As the Constitution in its original form did not address religious liberty, the First Congress addressed the issue in the broader context of debating a proposed Bill of Rights, principally written by Madison.[146] However, the Congressional Record, as well as records of state ratification proceedings on the topic of the religious clauses of the First Amendment, is sparse, as other issues dominated the discussion. Ultimately, the record is ambiguous, and the originalist must rely on alternate sources in order to gain historical perspective.

Although the members of the Constitutional Convention debated including a Bill of Rights, they ultimately decided against doing so. However, this decision was not universally well-received, as many of the state delegates objecting to ratification did so because of the lack of explicit constitutional guarantees of basic rights.[147] Although Madison was originally against inclusion, he eventually concluded – likely persuaded by Jefferson – that a Bill of Rights was necessary, and he promised the Virginia ratifying Convention that he would introduce a set of

[145] Id., §2
[146] Finkelman, p. 304
[147] Smith, p. 604

proposed amendments to that effect in the First Congress.[148] He followed through, and beginning in August of 1789, the House considered his proposal.[149]

Regrettably, the record of Congressional proceedings with respect to the Free Exercise Clause (as well as the Establishment Clause) is sparse.[150] However, the evolution of the language was recorded. Madison's first proposal closely mirrored the Virginia Act for Establishing Religious Freedom, but the responsible committee shortened it; the relevant part read, "the equal rights of conscience [shall not] be infringed."[151] After debate, the House chose to adopt the following formulation, proposed by Representative Ames: "Congress shall make no law…to prevent the free exercise [of religion], or to infringe the rights of conscience."[152] Unfortunately, the House never commented on Ames' language; rather, it was approved without further debate.[153]

The Senate, however, chose not to reference the "rights of conscience," only providing that Congress was forbidden to restrict the "free exercise of religion."[154] Unfortunately, the Senate's debates and votes on the issue were never recorded.[155] Ultimately, the joint conference committee agreed on language closer to the Senate's version: the now familiar command that "Congress shall make no law…prohibiting the free exercise" of religion.[156]

From this morass, however, there is one thing that is likely true. The language eventually adopted probably reflected Madison's understanding of free exercise. Although Ames' language

[148] Id., p. 605
[149] Id., p. 608
[150] Kurland, p. 855
[151] Id., pp. 854-5
[152] Id., p. 855
[153] Smith, p. 613
[154] Kurland., p. 855
[155] Smith, p. 613
[156] Kurland., pp. 855-6

was not debated, it is almost certain that his proposal was actually Madison's.[157] Moreover, Madison was a member of the joint conference committee that proposed the final language, which reflected Ames' proposal.[158] However, it is impossible to prove this with complete certainty, especially as the committee likely desired to leave some degree of ambiguity in the proposal as a matter of political expediency.[159]

The state ratification process sheds little additional light on the understanding of the religion clauses. Federalists tended to believe that the Constitution already protected religious liberty,[160] and Antifederalists did not substantively disagree, as they were more concerned with other potential threats to civil liberties.[161] Other parts of the Bill of Rights overshadowed the religious clauses, leading to little debate about religious freedom.

The original intent of both the ratifying states and the First Congress with respect to the religion clauses of the First Amendment is therefore unclear, as substantial ambiguity and a lack of debate make that intent difficult to discern. Thus, there are only two sources to which we can turn in order to reliably inform an originalist perspective. First, the intent of the primary author, James Madison, provides insight as to the intended meaning of the Free Exercise Clause. Second, the broad conception of religious liberty that existed in the Revolutionary era, informed by the events in Virginia, provides a guide as to how contemporary citizens may have understood the Clause.

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[157] Brant, p. 271
[158] Smith, p. 616
[159] Id., p. 616
[160] E.g. Kurland, p. 847 (quoting James Iredell at the North Carolina Constitutional ratifying convention)
[161] Id., p. 851

Conclusion

In 1993, Congress – with only three dissenting voices – found that the Framers intended the Free Exercise Clause to protect against incidental burdens on religion caused by facially neutral, generally applicable laws. The Virginia experience and the views of Madison, informed by the previous century of colonial history, tend to confirm that view.

Indeed, that is why the decision in *Smith* – in which Justice Scalia termed allowing exemptions to generally applicable laws a "luxury" – was so shocking to both the legal community and to the public.[162] The compelling interest test was the well-established standard used in free exercise cases (so much so that both parties in *Smith* assumed that it would be used), and the Supreme Court overturned it without even entertaining briefs or arguments on the issue, outraging many members of the legal community.[163] Even Free Exercise revisionists criticize the *Smith* decision, arguing that even though its central holding is sound, the decision itself is poorly reasoned, unpersuasive, an unjustified rejection of precedent, and an example of judicial overreach.[164]

In some senses, the doctrinal shift was not quite as abrupt as it seems. Marin, for example, argues that *Smith* is the culmination of a period of time during which the Court became reluctant to grant exemptions to religious believers, yet was unwilling to abandon the *Sherbert* test.[165] Only two of the Justices on the bench at the time of the *Sherbert* decision – Brennan and White – were also serving when *Smith* was decided, and it may be that the shift in doctrine was simply a consequence of the Court's changed membership.[166]

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[162] *Smith*
[163] Laycock (B), p. 1
[164] See, e.g., Marshall, pp. 308-9
[165] The Court accomplished this by consistently holding that the state had met its burden under the *Sherbert* test. See Marin, pp. 1445 ff.
[166] Both White and Brennan decided the two cases consistently: White voted against the religious believers, and Brennan voted for them.

Ultimately, the Court's conclusion is utterly inconsistent with its previous jurisprudence. Consider Justice Scalia – the same Justice who in 1990 wrote:

> We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.[167]

one year earlier wrote:

> In such cases as *Sherbert v. Verner*, *Wisconsin v. Yoder*, *Thomas v. Review Bd. of Indiana Employment Security Div.*, and *Hobbie v. Unemployment Appeals Comm'n of Fla.*, we held that the free exercise clause of the First Amendment required religious beliefs to be accommodated by granting religion-specific exemptions from otherwise applicable law.[168]

Of those two statements, only one can be correct. If history is any guide, the latter statement is closer to correct than the former.[169]

[167] *Smith*
[168] *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (Scalia, J., dissenting)
[169] Credit is due to Laycock for initially presenting these quotes in this manner (see Laycock [B], p. 3).

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[173] "House Hearings II"
[174] "Hening"

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